

STATE OF NORTH DAKOTA
GAME AND FISH DEPARTMENT

IN THE MATTER OF:

Kelly Wade Kapfer

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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On July 13, 2002, Officer Tim Phalen ("Phalen"), a game warden for the North Dakota Game and Fish Department ("Department") issued to Kelly Wade Kapfer ("Kapfer") a "Report and Notice - Boating Under the Influence - Title 20.1, NDCC" ("Report and Notice form") relating to a possible loss of motorboat privileges resulting from refusal to submit to testing, *i.e.*, a statement of intent to prohibit Kapfer from operation a motor boat or vessel. On July 23, 2002, Kapfer, through his attorney, Darold A. Asbridge, Bismarck, requested an administrative hearing on the matter under N.D.C.C. ch. 20.1-13.1

On July 25, 2002, the Department requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the matter. At the hearing the Department amended its request, asking that the ALJ issue a final order. On July 26, 2002, the undersigned ALJ was designated.

A prehearing conference was scheduled and held by the ALJ on this matter on July 30, 2002. Mr. Asbridge attended for Kapfer; Special Assistant Attorney General Paul C. Germolus attended for the Department. At the prehearing conference, the parties agreed to a hearing date, to

an exchange of documents, to the issues for the hearing, and to the application of the rules of evidence at the hearing.

On August 2, 2002, the ALJ issued a Notice of Hearing. The hearing was held as scheduled on August 12, 2002, in the Office of Administrative Hearings, Bismarck, North Dakota. Mr. Germolus represented the Department at the hearing. Kapfer was not present at the hearing. However, Mr. Asbridge attended and represented Kapfer at the hearing. Mr. Germolus called four witnesses, all Department employees, each a game warden. He offered nine exhibits (exhibits A-I) most of which were admitted (exhibits C, D, and F were not admitted over objection) (red exhibit labels). Mr. Asbridge offered one exhibit (exhibit 1) which was admitted (blue exhibit label).

At the hearing, prior to the testimony of witnesses, Mr. Germolus objected to the hearing continuing without the presence of Kapfer. Mr. Asbridge said that he expected Kapfer to personally appear, but Kapfer was not present when the hearing started. Based on N.D.C.C. § 20.1-13.1-08(6), Germolus moved that if Kapfer did not appear for the hearing that his right to a hearing be considered waived, and that the hearing officer make his determination based on the officer's report and other evidence as may be available. Mr. Asbridge said that for purposes of N.D.C.C. § 20.1-13.1-08, Kapfer had made an appearance through his counsel and was not in default within the meaning of that section. Mr. Germolus renewed his motion at the close of the hearing when it was obvious that Kapfer would not be personally appearing at the hearing.

The Department's motion under N.D.C.C. § 20.1-13.1-08(6) is DENIED. If the statute is intended to require the personal appearance of the respondent in these Department hearings it would have said "[i]f the person who requested a hearing ... fails to [personally] appear at the hearing without justification..." Mr. Asbridge represented Kapfer throughout this proceeding. He made the request for hearing for Kapfer. He attended the prehearing conference for Kapfer. He

made an appearance for Kapfer at the hearing, representing him as counsel. The Department did not object in any of these situations, except the later. Although Mr. Asbridge said that he expected Kapfer to personally appear for the hearing, the fact that he did not, given Mr. Asbridge's formal appearance for him, cannot be interpreted to mean that Kapfer failed to appear for the hearing under N.D.C.C. § 20.1-13.1-08(6). That subsection contemplates a complete default situation, *i.e.*, when neither the respondent nor anyone representing the respondent makes an appearance at the hearing. In a civil matter such as this one, an appearance by counsel for the respondent is an appearance by the respondent.

The only three issues for this hearing, in accordance with the provisions of N.D.C.C. § 20.1-13.1-08(3), are as follows:

- (1) Whether a game warden or law enforcement officer had probable cause to believe that Kapfer had been operating a motorboat or vessel in violation of N.D.C.C. § 20.1-13-07.
- (2) Whether Kapfer was placed under arrest, and
- (3) Whether Kapfer refused to submit to the chemical test.

At the close of the hearing the ALJ heard oral argument from counsel. During oral argument, Mr. Asbridge stipulated that the facts show that Kapfer was placed under arrest and that he refused to submit to the chemical test. However, Mr. Asbridge argued that Phalen, the arresting officer, did not have probable cause to believe Kapfer had been operating a motorboat or vessel in violation of N.D.C.C. § 20.1-13-07; therefore, the administrative action against Kapfer should be dismissed.

Based on the evidence presented at the hearing and the oral argument of counsel, the administrative law judge makes the following findings of fact and conclusions of law. The ALJ finds and concludes that Kapfer was placed under arrest, that he refused to submit to the

chemical test, and that Phelan had probable cause to believe Kapfer had been operating a motorboat in violation of N.D.C.C. § 20.1-13-07. Therefore, the provisions of N.D.C.C. § 20.1-13.1-06(1) apply, resulting in a prohibition from operation of a motorboat or vessel.

FINDINGS OF FACT

1. On July 13, 2002, Kapfer was observed by two Department game wardens to be operating a motorboat ("the boat") on the Missouri Rive near Bismarck. One of the game wardens was Phalen. Phalen and Officer Myhre ("Myhre") were routinely patrolling the Missouri River on that day, observing boating activity.

2. Phalen and Myhre observed a passenger on the front of the enclosed bow of the boat, not wearing a life jacket ("PFD"), reclining on the bow of the boat. The passenger on the bow was not Kapfer. When observed, Kapfer was operating the boat at the steering wheel.

3. The two officers made physical contact with the boat and stopped it, holding on to the boat. The two officers stopped the boat to do a safety check and investigate further. The passenger was asked to get off of the bow of the boat and did get off of the bow.

4. Upon contact with the boat both officers smelled a strong odor of alcoholic beverages.

5. Phalen asked Kapfer to show him two PFDs. Kapfer was standing at the time and said that he had the two PFDs. Phalen also asked Kapfer to remove his sunglasses. Kapfer removed them and Phalen observed that Kapfer's eyes were bloodshot. Kapfer then wobbled and fell backwards in the boat. Phalen instructed Kapfer to remain seated and put on a PFD. But, Kapfer then stood up again, and again fell backwards, tripping over a cooler in the boat, nearly falling out of the boat. There was little wind and no wave action during the two times Kapfer fell. Myhre then jumped into the boat and upon Phelan's instructions drove the boat to shore.

6. When Myhre entered the boat to drive it to shore, he knocked over a mug (see exhibit B) and a liquid spilled on his pants. Myhre smelled an odor of alcoholic beverage from the spilled liquid. He told Phalen about the spill and the odor of alcoholic beverage just after the boat was landed, when Phalen approached the boat after landing the officer's boat. The mug had been sitting on the floor just under the steering wheel of the boat when Myhre knocked it over.

7. On shore, Phalen asked Kapfer to exit the boat and move away from it with him. Phalen then spoke with Kapfer. As he spoke with him he smelled an odor of alcoholic beverage on Kapfer's breath. He also again noted that Kapfer's eyes were bloodshot, that his speech was slurred and that he appeared to have poor balance and was wobbly.

8. Phalen asked Kapfer if he was sick or injured. Kapfer replied that he was not. Kapfer had an open cut on one leg and when questioned about it, Kapfer replied that it was from a prop injury a week ago. Phalen then asked Kapfer if he was under the care of a doctor or dentist. Kapfer replied that he was not. Phalen then asked Kapfer if he was taking any medication or drugs. Kapfer replied that he was taking penicillin and ibuprofen.

9. Then Phalen proceeded to give Kapfer some field sobriety tests. Phalen testified that for boat operators the standard motor vehicle sobriety tests are not used because of the effects of long periods of boat riding on the boat's occupants. Phalen asked Kapfer what was the last year of school he completed. Kapfer responded 10th grade. Phalen then asked Phalen if he knew the alphabet. Kapfer replied that he did. Phalen asked him to recite it. Kapfer did starting fast and then slowing down with hesitation between letters. He stopped for a long time after the letter S and then said the remaining letters very fast, slurring them together to the end of the alphabet. Phalen then asked Kapfer if he could count from 1-100. Kapfer said that he could. Phalen asked Kapfer to count backwards from 89 to 65. Kapfer did so, but he repeated some

numbers and stopped at 69, asking how far he needed to count. Finally, Phalen asked Kapfer to do a finger count test which Phalen twice explained to Kapfer. The test involves touching the thumb to each finger and counting, from one to four, then reversing and counting backwards, from four to one, touching thumb to each finger again. Kapfer touched his thumb to each finger going forwards but did not count, and he did not reverse the thumb touching or count backwards. Phalen believed that Kapfer failed each of the three field sobriety tests.

10. Immediately following the field sobriety tests, Phalen asked Kapfer if he would take an on-site, breath-screening test (SD-2). Kapfer refused saying that it would probably not be in his favor.

11. During the field sobriety testing Kapfer was unsteady on his feet, wobbling continually, and he acted confused.

12. Phalen then placed Kapfer under arrest, handcuffed him and, with another officer's assistance (using her vehicle) transported Kapfer to the Burleigh County Detention Center.

13. At the detention center, Phalen read to Kapfer the "Implied Consent Advisory" on the back of the Report and Notice form, exhibit 1. He then asked Kapfer to take a chemical breath test. Kapfer refused to take one. Phalen then issued to Kapfer the Report and Notice form, Exhibit A.

14. Phalen did not cite Kapfer for any other violations of law.

15. Although there were some inconsistencies in the testimony of some of the Department's witnesses (the witnesses were sequestered), the inconsistencies were not such that the evidence of any of the witnesses should not be believed. Moreover, the evidence given by the four witnesses was, overall, despite some inconsistencies, remarkably consistent.

CONCLUSIONS OF LAW

1. The evidence shows, by the greater weight of the evidence, that on July 13, 2002, Kapfer was operating a motorboat on the Missouri River when Department game wardens stopped him. The evidence shows, and Kapfer stipulates, that as a result of that stop he was placed under arrest and refused to submit to the chemical test. The evidence further shows, by the greater weight of the evidence, that Phelan, the arresting officer, had probable cause to believe Kapfer had been operating a motorboat in violation of N.D.C.C. § 20.1-13.1-07, before he placed Kapfer under arrest and before Kapfer refused to submit to the chemical test.

2. The two Department game wardens had probable cause for stopping the boat for safety concerns and investigative purposes, and Phelan had probable cause to believe that Kapfer had been operating the boat in violation of N.D.C.C. § 20.1-13-07. There was a reasonable and articulable reason for stopping the boat for safety and investigative purposes because of a violation of the law. *See City of Devils Lake v. Lawrence*, 639 N.W. 2d 466 (N.D. 2002); *State v. Ova*, 539 N.W. 2d 857 (N.D. 1995). There was a reasonable and articulable reason to believe that Kapfer had been operating the boat in violation of N.D.C.C. § 20.1-13-07, before he was arrested and refused the chemical test.

3. N.D.C.C. § 20.1-13-07 states, in part, as follows:

20.1-13-07. **Prohibited operation - Penalty.**

2. No person may operate any motorboat or vessel ... while intoxicated or under the influence of any narcotic drug, barbiturate, or marijuana.

4. N.D. Admin. Code § 30-05-01-03 states, in part, as follows:

30-05-01-03. **Hazardous conditions**. North Dakota law provides that any enforcement officer who observes a vessel being used in an unsafe condition, and in the officer's judgment such use creates an especially hazardous condition, may direct the operator to take whatever immediate and reasonable steps would be necessary for the safety of those aboard the vessel, including directing the operator to return to mooring and to remain there until the situation creating the hazard is corrected or ended. For purposes of this section, an unsafe condition is defined as any one of the following:

1. Operating without boat safety equipment required by section 30-05-01-02 ...
4. Riding on the bow, ... without taking precautions sufficient to prevent falls overboard.

5. N.D. Admin. Code § 30-05-01-02 states, in part, as follows:

30-05-01-02. **Boat safety equipment**. The following equipment is required as indicated, and must be usable and in serviceable condition.

1. Personal flotation devices. All motorboats less than sixteen feet ... in length ... must have one coast guard approved type ... device aboard for each person. All motorboats sixteen feet ... or greater in length must have one coast guard approved type ... device aboard for each person, and, in addition, one coast guard approved throwable type IV device.

6. The two game wardens, while on routine patrol of the Missouri River, observed the boat operated by Kapfer in which a passenger was reclining on the bow of a closed bow boat without a life jacket on. They could see no evidence of any life jackets in the boat from their vantage point. This was a clearly hazardous condition and they were authorized under law to stop the boat for safety purposes and to investigate. After stopping the boat, they asked Kapfer about whether the boat had PFDs for its two occupants. Because of the situations which

occurred before and after the stop (after the stop they smelled the odor of alcoholic beverages, observed Kapfer falling down twice, officer Phelan saw Kapfer's bloodshot eyes, and Myhre experienced a mug spilling its contents on his pants with the odor of alcoholic beverages coming from it, which he told Phelan about before the arrest), Myhre drove the boat to shore and Phelan began field sobriety tests on Kapfer, the boat's operator at the time of the stop. Even before Phelan began field sobriety tests he had probable cause to believe Kapfer had been operating a motorboat in violation of N.D.C.C. § 20.1-13-07(2). With the sobriety tests, Phelan had even more probable cause. Arguably, Kapfer failed the three sobriety tests administered by Phelan. Moreover, just before administering the tests Phelan again smelled the odor of alcoholic beverages on Kapfer's breath and Kapfer wobbled continually during the tests, acting in a somewhat confused manner.

7. Under N.D.C.C. § 20.1-13.1-01, any person who operates a motorboat or vessel in this state is deemed to have given consent, and shall consent... to a chemical test, or tests, of the blood, breath, saliva or urine for the purpose of determining the alcoholic, other drug, or combination thereof, content of the blood.

8. The Department has the authority, through its director, under N.D.C.C. § 20.1-13.1-06(1), if a person refuses to submit to testing under section 20.1-13.1-01, if probable cause existed, to prohibit the person from operating a motorboat or vessel for a period of one year. N.D.C.C. § 20.1-13.1-06 (1)(a). There was no evidence adduced at the hearing that Kapfer had been previously prohibited from operating a motorboat for a violation of 20.1-13-07 within a period of five years.

9. N.D.C.C. § 20.1-13.1-06 states in part as follows:

20.1-13.1-06. Revocation of privilege to operate motorboat or vessel upon refusal to submit to testing.

1. If a person refuses to submit to testing under section 20.1-13.1-01, no chemical test may be given, but the game warden ... shall immediately issue to that person a statement of intent to prohibit the person from operating a motorboat or vessel. The director, upon the receipt of the certified written report of the game warden ... in the form required by the director ... showing that the warden ... had probable cause to believe the person had been operating a motorboat or vessel while in violation of section 20.1-13-07 or had observed that the motorboat or vessel was operated in a negligent, reckless, or hazardous manner as defined by the director by rule, that the person was lawfully arrested if applicable, and that the person had refused to submit to the chemical test under section 20.1-13.1-01, shall prohibit the person from operating a motorboat or vessel in this state for the appropriate period under this section. The period for which a person is prohibited from operating a motorboat or vessel under this section is:
 - a. One year if the person's record shows that within the five years preceding the most recent refusal under this section, the person has not been prohibited from operating a motorboat or vessel for a violation of this chapter or for a violation of section 20.1-13-07.

10. N.D.C.C. § 20.1-13.1-08 states, in part, as follows:

20.1-13.1-08. **Administrative hearing on request.**

3. ...The scope of a hearing for refusing to submit to a chemical test under section 20.1-13.1-01 may cover only the issues of whether a game warden ... had probable cause to believe the person had been operating a motorboat or vessel in violation of section 20.1-13-07; whether the person was placed under arrest; and whether that person refused to submit to the chemical test.

6. If the person who requested a hearing under this section fails to appear at the hearing without justification, the right to the hearing is waived, and the hearing officer's determination on prohibition of the person from operating a motorboat or vessel will be based on the written

request for hearing, game warden's ... report, and other evidence as may be available ...

11. The provisions of N.D.C.C. chs. 20.1-13 and 20.1-13.1, and applicable rules of the Department have been complied with in this administrative action and during the course of this hearing. The evidence shows a violation of the law for which Kapfer may be administratively punished under the law.

ORDER

The greater weight of the evidence shows that Kapfer violated the provisions of N.D.C.C. § 20.1-13-07(2). It is ORDERED that under N.D.C.C. § 20.1-13.1-06(1)(a), Kapfer is prohibited from operating a motorboat or vessel in this state for a period of one year from the date of the receipt of this order.

Dated at Bismarck, North Dakota, this 16th day of August, 2002.

State of North Dakota
Dean Hildebrand, Director
Game and Fish Department

By: _____
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